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IN THE

Supreme Court of the United States

October Term, 1995

MARGARET T. IRVING

Petitioner,

v.

DISTRICT OF COLUMBIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY TO BRIEF IN OPPOSITION

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I. The Second Sentence of Rule 10

Respondent Moshovitis begins his argument against the exercise of certiorari jurisdiction with a quotation from this Court's Rule 10 which leaves out the critical second sentence of its opening paragraph (emphasis added):

> The following, although *neither controlling nor fully measuring the Court's discretion*, indicate the *character* of the reasons the Court considers:

The petitioner argues that the District of Columbia Court of Appeals has firmly adopted a doctrine which sanctions the use of the governmental power to impose a forfeiture in a manner which conflicts with the constitutional guarantee of due process. That is an extremely serious matter whose

implications go well beyond District of Columbia real property tax law, and is clearly of the character indicated in subparagraph (c) of Rule 10.[1]

II. Effects of the Partial Settlement Agreement

When the notice of appeal was filed in the trial court, the question of a stay pending appeal was presented to that court. Both Mrs. Irving and Mrs. Robinson realized that, in view of the character and location of the property, it was essential that it be occupied and maintained throughout any appellate proceedings, or otherwise whoever won would have only a Pyrrhic victory. Accordingly, they entered into a three-party agreement with the tenant, whereby the tenant was obliged to continue occupancy, to pay taxes, and to provide maintenance and security at its own expense, until such time as the litigation was concluded, when the tenant would be obligated to purchase the property, at a price fixed in the agreement, from whoever might be determined to be the owner. The trial court granted a stay conditioned upon the performance of this agreement.

In the trial court, Mrs. Robinson had demanded "Damages for delay caused by the interference by the plaintiff with Mrs. Robinson's contractual rights."[2] Both Mrs. Irving and Mrs. Robinson understood that the costs of litigating this claim could be out of all proportion to any benefit to either party, given the extended period of time involved, the poor state of

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1. Subparagraph (c) of Rule 10 reads as follows:

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

2. Paragraph 3 of the prayer for relief in the Answer, Counterclaim, and Cross-claim filed by Mrs. Robinson in the trial court, Record, p. 23.

some of the records, and the debatability of applicable accounting principles. Accordingly, they agreed to settle that issue by providing, in the three-party agreement, that the prevailing party on the tax deed issue would reimburse the losing party to the extent of the losing party's payment of certain taxes that would otherwise be a charge against the property. The dollar amounts of such payments, $11,402.83 in the case of Mrs. Irving and $7,941.58 in the case of Mrs. Robinson, were specified in the agreement.

In entering into this agreement, neither party had the slightest intention of waiving or abandoning any claim or defense she might have on the main issue, *viz.*, whether Mrs. Robinson was entitled to a mandatory injunction for the issuance of a tax deed to a property which, when this case was filed, was assessed by the Department of Finance and Revenue at $170,000.00.[3] Neither party advanced any such contention in the Court of Appeals, and it is simply frivolous for respondent Moshovitis to advance it in this Court, as he has done at pages 5 and 9 of his brief in opposition.

At page 2 of that brief, he makes the equally untenable argument that the partial settlement agreement precludes review by this Court because it prescribes what is to be done upon final judgment, and that the judgment of the Court of Appeals entered October 16, 1995, is such a judgment. An appellate judgment, however, is not final until the mandate issues, and the rules of the Court of Appeals provide for stays to permit application to the Supreme Court for a writ of certiorari. In the case at bar, the Court of Appeals, by order, stayed the issuance of the mandate until January 15, 1996, for this purpose. The petition herein was filed on January 11, 1996, and the clerk of this Court so notified the clerk of the Court of Appeals, thereby triggering a further automatic stay

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3. Tax bill issued in June of 1992, Plaintiff's Exhibit G, Record, p. 18.

under that court's Rule 41(b) "until final disposition by the Supreme Court of the petition."

III. The Interval Between Application and Payment

Petitioner has argued that during the interval between the expiration of the redemption period on the Robinson's 1986 tax sale purchase, and the earliest possible date on which the Robinsons could be said to have satisfied the statutory requirements for the issuance of a tax deed, the District of Columbia fatally compromised its own power to forfeit the property interests of Mrs. Irving. The respondent District of Columbia itself has offered no response to that argument.

A response offered by the respondent Moshovitis is the demonstrably false suggestion that no such interval existed. At page 2 of his brief in opposition, he asserts--

> First, the respondents [*sic*] applied for a tax deed on the subject property by surrendering to the District the tax sale certificate they had received subsequent to the 1986 tax sale, along with the money to pay the outstanding taxes, penalties, and interest.

In fact, some 32 months elapsed between the surrender of the tax sale certificate and the first and only tax deed payment the Robinsons ever made on this property. Mrs. Robinson never made any attempt to mislead the lower courts on this point. In her brief in the Court of Appeals, she said at page 4--

> In January of 1988, Appellee Verna C. Robinson surrendered the tax sale certificate obtained at the 1986 tax sale to the District of Columbia Department of Finance and Revenue for the issuance of a tax deed.

and at page 5 of that brief she said--

> On September 28, 1990, Appellee Robinson paid $6,176.56 to the District, which was the amount necessary to obtain the tax deed.

So much for the contention that Mrs. Robinson surrendered her tax sale certificate "along with" the money to pay outstanding taxes.

The reason for the "along with" representation is obvious. If it were in fact true, Mrs. Robinson's assignee, the private respondent here, would be in a better position to seek the benefit of the equitable conversion doctrine, under which Mrs. Robinson could be treated as if she had already acquired the property before it passed to Mrs. Irving, even though no deed had been issued.

In this connection it should be noted that the application for the deed, reproduced at pages 60 and 61 of the Record, is not a bilateral contract or agreement. An applicant who declines to make the necessary payment is entirely free to walk away from the deal, a very real possibility in an era of declining values and potential liabilities for environmental hazards unknown at the time of application. To treat such an applicant as having acquired ownership for any and all purposes is insupportable on any theory.

IV. Lack of Notice to the Petitioner

The private respondent's brief emphasizes that the 1986 tax sale was conducted in accordance with the statute up to the end of the redemption period, but the fallacy of the brief is in its assertion that that is the end of the story. The complete tax sale process includes the transactions that occur after the running of the redemption period. The absolutist language of *District of Columbia v. All of Lot 9, Square 5148*[4] can work without infringing constitutional rights as long as it is limited to an analysis of the rights of the tax sale buyer against the record owner in situations where there has been no change in record ownership and the District has

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4. 110 Daily Wash.L.Rptr. 469 (D.C. Super.Ct. 1982), also reprinted at page A26 of the petition herein.

performed its duties as contemplated in the statutory scheme, but that is not this case.

Respondent Moshovitis argues at page 4 of his brief--

> [P]etitioner was not deprived of the subject property without due process, because petitioner as well as petitioner's predecessor in title, were afforded adequate notice and an opportunity to redeem the subject property pursuant to District of Columbia law.

The fact is that the petitioner neither was afforded, nor, under District of Columbia law, could have been afforded an opportunity to redeem the 1986 sale, because it was not until more than a year after the expiration of the redemption period that she had any interest in the property whatsoever.

As for constructive notice, that is generally a legal fiction which is employed when for whatever reason actual notice is not reasonably possible. It defies common sense to maintain that timely notice of the 1986 tax sale was given to this petitioner when promptly after assuming her duties as personal representative, she sent her agent directly to the source, the Department of Finance and Revenue, and was not only given no notice of an irredeemable tax sale, but was presented with a bill for taxes wholly inconsistent with loss of ownership of the property.

Respondent Moshovitis cites *Frassetto v. Barry*[5] and *Kann v. King*[6] in support of his contention that adequate notice was given, but the constitutional adequacy of notice was never an issue in either of those cases. In each of them, the Court of Appeals held that the notice given did not meet *statutory* requirements, and thus there was no occasion to consider a constitutional issue. No further review of *Frass-*

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5. 497 A.2d 109 (D.C. 1985).

6. 25 App. D.C. 182 (1905), *reversed*, 204 U.S. 43, 27 S.Ct. 213, 51 L.Ed. 360 (1907).

etto was sought, and no mention of notice was made in the opinion of this Court reversing the Court of Appeals decision in *Kann v. King*, that case going off on equitable rights as between landlord and tenant.

We agree with respondent Moshovitis that the dictum he cites in *Malone v. Robinson*[7] supports his position. That is why we feel it is so important that this Court grant this petition. There was no occasion to test the validity of that dictum by a petition to this Court, because the case was sent back to the trial court for further proceedings to determine whether a District of Columbia regulation in respect of notice had been complied with. That regulation has no application to the case at bar, because it deals with notice required *before* the expiration of the redemption period, and that brings us to the final fallacy in the respondent's brief.

V. The Frozen Interest Fallacy

The argument of respondent Moshovitis asserts that the entire property interest of the petitioner entitled to due process protection was frozen as of the instant of her decedent's death, ignoring the fact that she sued "Individually and as Personal Representative of Harold R. Kyles, Deceased."[8] As the petitioner repeatedly argued in the courts below, ownership of commercial property in a high-crime urban area involves an ongoing input of time, attention, and money, not to mention worry and risk. The respondent's simplistic analysis is simply inadequate to cope with the reality.

The value of this property represents a significant proportion of an individual's net worth. In the two and a quarter year interval between the death of the decedent and the first indication she received that there might be an adverse claim, important and irrevocable decisions and investments had to

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7. 614 A.2d 33, 35, n.4 (D.C. 1992).

8. Caption of Plaintiff's 2nd Amended Complaint, Record, p. 2.

be made not just for her benefit but for that of the community as well. Margaret Irving made them in good faith. If the District now proceeds to forfeit the property whose preservation is the fruit of her stewardship, she will have been the victim of a course of action by the District which, if carried out by any private individual or organization, would by the mildest terminology be classified as constructive fraud. Such a course of action by a government can not be called due process of law.

Respectfully submitted,

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